Quality House of Graphics, Inc. *and* Local One-L, Graphic Communications International Union. Cases 29–CA–21820, 29–CA–21963, and 29–CA–22041

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On July 22, 1999, Administrative Law Judge Jesse Kleiman issued the attached decision. The General Counsel filed exceptions and a supporting brief and an answering brief to the Respondent's exceptions. The Charging Party filed an exception and supporting brief, a brief in opposition to the Respondent's exceptions, and a reply to the Respondent's answering brief. The Respondent filed exceptions and a supporting brief, answering briefs to the General Counsel's and the Charging Party's exceptions, and reply briefs to the General Counsel's and the Charging Party's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt his recommended Order as modified.[4]

In its exceptions, the Respondent contends, inter alia, that the judge erred in failing to determine that its checkoff and remittance of employee contributions to the Inter-local Pension Fund violated Section 302 of the Labor Management Reporting and Disclosure Act (LMRDA of 1959). Specifically, the Respondent contends that its remittance of employee contributions to the fund violated Section 302 because the fund fails to satisfy the joint administration, arbitration, and other protective provisions of Section 302(c)(5)(B). Therefore, the Respondent argues, the Board cannot order it to remit employee contributions to the fund.

Section 302 makes it unlawful for an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value to any representative of his employees. Section 302(b) also makes it unlawful for any person to request or accept such a payment. Section 302(c)(5)(B) excepts from these prohibitions payments by an employer to a trust fund established by any representative of his employees for the benefit of the employees, provided that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer and the employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representative of the employees may agree upon," 29 U.S.C. § 186(a)–186(c)(5)(B) (1988). Authority to restrain violations of Section 302 is vested in the United States district courts by Section 302(d) and (e).

While the Board is not charged by the statute with responsibility for enforcing Section 302, the Board has held that it is appropriate to consider the applicability of Section 302 as a possible defense to unfair labor practice allegations, in order to avoid placing a party in the position of being required to comply with two conflicting statutory mandates. *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986). In the present case, however, it is not necessary to determine whether the Respondent's checkoff and remittance of employee contributions to the Inter-Local Pension Fund violated Section 302, because even if it did, we would still find that the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge inadvertently described the Respondent's contribution to the Supplemental Disability and Retirement Fund (SRDF) as 7 percent of employee wages, remitted to the International. The Respondent's contribution was actually 7 percent of scale, remitted to the SRDF. We correct these inadvertent errors.

[3] We read the Respondent's Inter-Local Pension Fund proposals as requiring that all unit employees have the option, under the contract, of contributing or not contributing to the Fund, irrespective of whether they were full union members or financial core members. We note that the Respondent made no contributions to the Fund. We also note that participation in the Fund was a condition of full union membership. Therefore, Respondent's proposal related to a permissive internal union matter. The Respondent's insistence to impasse on the matter violated Sec. 8(a)(5).

In adopting the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) by discontinuing dues checkoffs following expiration of the contracts, we additionally rely on *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000).

Contrary to our dissenting colleague, however, we do not find that the Respondent's obligation to check off employee contributions to the Inter-Local Pension Fund ceased at contract expiration. It is well settled that most terms and conditions of employment continue after contract expiration. Such continuing terms and conditions include matters of administrative convenience such as checkoff agreements for employee savings or charitable contributions (which, like the Inter-Local Fund, are not themselves mandatory subjects of bargaining). The fact that the Board has crafted a limited exception to this principle for the checkoff of union dues (whether or not tied to a contractual union-security agreement) does not, in our view, warrant a contrary result.

[4] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001). We further amend the recommended Order and notice by inserting unit descriptions where appropriate. We also add an inadvertently omitted paragraph to the notice requiring the Respondent to rescind its retaliatory and regressive bargaining proposal.

Respondent's unilateral discontinuation of the checkoff violated Section 8(a)(5) of the Act.[5]

The judge found, and we agree, that contract negotiations were not at impasse when the Respondent discontinued the Inter-Local Pension Fund checkoff. The Respondent therefore could not lawfully discontinue the checkoff without the Union's assent, unless the Union waived its right to bargaining or there were extraordinary circumstances compelling prompt action. *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979); *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB,* 15 F.3d 1087 (9th Cir. 1994). The Respondent does not contend that the Union waived its right to bargain over the Inter-Local Pension Fund checkoff. Therefore, the Respondent would not be justified in discontinuing the checkoff without reaching agreement or impasse on the collective-bargaining agreement as a whole unless the alleged conflict with Section 302 constituted an extraordinary circumstance. In *RBE Electronics*, 320 NLRB 80 (1995), the Board explained that there are two categories of exigencies, which may alter an employer's bargaining obligation. The first category consists of extenuating circumstances so compelling that no bargaining is required.

This category is limited to "extraordinary events which are an unforeseen occurrence," and "require the company to take immediate action." *RBE*, 320 NLRB at 81. In general, the necessity to alter terms and conditions of employment to meet the requirements of other Federal statutes does not fall within the category of exigencies, which excuse bargaining altogether. As stated by the Board in *Foodway*, 234 NLRB 72, 77 (1978):

> [T]he salient principle applicable to the instant inquiry is that the Union was entitled to an opportunity to negotiate concerning the matter and not to be confronted in fact or in substance with a fait accompli. . . . [T]he Act is the legislative scheme which, in final analysis, prescribes Respondent's bargaining obligation. While the mandate and requirements of other Federal statutes may serve to limit the area of discretion which a party may exercise in fulfilling [its] bargaining obligation, [its] obligation to enter into the bargaining process in good faith is not thereby minimized or obviated [citations omitted].

Moreover, the Respondent has not demonstrated that the alleged conflict with Section 302 was an unforeseen occurrence or that it required the company to take immediate action. The record does not indicate when the Respondent first learned of the potential conflict with Section 302. However, it had acquiesced in the checkoff arrangement for many years. Under these circumstances, we do not find that the alleged conflict with Section 302 constituted an extraordinary event so compelling that unilateral action was justified.

The second category of exigency identified in *RBE* consists of circumstances that are "not sufficiently compelling to excuse bargaining altogether," but that "require prompt action" and "cannot await" final agreement or impasse on the collective-bargaining agreement as a whole. *RBE*, 320 NLRB at 81–82. When an employer is confronted with an exigency of this type, the employer's duty is to "provide the union with adequate notice and an opportunity to bargain," and to bargain to impasse over the particular proposal at issue. Id. at 82.

We find it unnecessary to determine whether the facts of this case fall within the second category. If the Respondent was facing such an exigency, it was obligated to bargain in good faith with the Union by informing and discussing with the Union the alleged legal mandates with which the Respondent felt constrained to comply, providing an opportunity to bargain over the proposed change and bargaining to impasse.[6] In the present case, the Respondent failed to provide appropriate notice or opportunity to bargain prior to discontinuing the Inter-Local Pension Fund checkoff. At no time during the negotiations did the Respondent notify the Union of its intention to discontinue the checkoff or of its view that the checkoff was proscribed under Section 302. In fact, throughout bargaining, the Respondent proposed continuing the checkoff, but making participation in the fund a voluntary aspect of full union membership.

Accordingly, we find that even if the Respondent was facing an exigency of the second type identified in *RBE*, it

[5] Unlike our dissenting colleague, we do not conclude that the checkoff and remittance of employee contributions to the Fund violates Sec. 302. Instead, as noted below, we leave that issue to the compliance stage of this proceeding, as we find it unnecessary to resolve it at this time.

[6] We reject any contention that the discontinuation of the checkoff was not susceptible to collective bargaining if, as alleged, it was mandated by Sec. 302. In such circumstances, notice of the proposed change facilitates open discussion and gives the union notice of exactly what might be lost and an opportunity to defend the legality of the term and condition of employment at issue. Further, dialogue at the bargaining table could well lead to a mutually agreed-upon modification of the term and condition of employment at issue, which is entirely consistent with the law. Or, upon close bargaining table scrutiny, the parties might agree that discontinuation of the practice is mandated. Even if the parties agree that discontinuation of the practice is mandated, however, the employer would still be obligated to bargain over the effects of the change on other terms and conditions of employment. Another possibility is that of deadlock or impasse on the particular proposal at issue. In such circumstances, the employer would be free to unilaterally discontinue the practice if confronted with an exigency of the second type identified in *RBE*.

violated Section 8(a)(5) by discontinuing the checkoff because it failed to provide the Union with the required notice and opportunity to bargain. However, in order to avoid the predicament discussed by the Board in *BASF Wyandotte*, supra, in which compliance with an Order of the Board results in a violation of Section 302, the Respondent will be given the chance to prove at compliance that resuming the checkoff would violate Section 302.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Quality House of Graphics, Inc., Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) On request, bargain with the Union as the exclusive representative of the Respondent's employees in the Photo-Engraver and Photo-Industrial units, as set forth below, without insisting to impasse unlawfully over contributions to the Inter-Local Pension Fund, a nonmandatory subject of bargaining, over the Union's objections, and as a condition of reaching agreement on successor collective-bargaining agreements, and, if understandings are reached, embody such agreements in signed contracts:

> Photo-Engravers unit [set forth in Article 3, Section 1 of the Photo-Engravers Agreement]: All employees (including foremen) engaged to do the work which comes under the jurisdiction of the Graphic Communications International Union, shall without limitation, be covered by the terms of this contract; all work, processes, operations and products directly or indirectly in whole or in part incident to, associated with or related to Lithography, Offset (including dry or wet), Photo-engraving, Intaglio, Gravure, including without limitation any technological or other change, evolution of or substitution for any work, process, operation or product now or hereinafter utilized in any of the methods or for any of the purposes described above.
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> Photo-Industrial unit [set forth in Article 4, Section 4.1 of the Photo-Industrial Agreement]: All employees, excluding salesmen, journeymen, and apprentices.

2. Substitute the following for paragraph 2(b):

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN HURTGEN, dissenting in part.

I agree that there was not a good-faith impasse. Therefore, with two exceptions as noted below, the Respondent was not privileged to implement the unilateral changes.

As to the first exception, I agree with my colleagues that Respondent lawfully made the change of stopping the checkoff of union dues.

With respect to the second exception (and this is the crux of my partial dissent), I conclude that Respondent could also lawfully stop the checkoff of employee contributions to the union pension fund.

In the first place, as discussed by my colleagues, the checkoff payment of these moneys is unlawful under Section 302, and it is not protected under Section 302(c)(4) or (5). That is, the moneys are not union dues, and the moneys are not paid into a bipartite trust fund.

My colleagues argue that the employer has made these payments in the past and that there was no compelling reason to unilaterally discontinue the payments. However, an unlawful subject is not a mandatory subject. And, past practice (and even contractual obligation) cannot convert a nonmandatory subject into a mandatory one.[1] Thus, Respondent's discontinuance of the past practice was not a violation of Section 8(a)(5).[2]

Further, assuming arguendo that the checkoff payments were not unlawful under Section 302, there would still be no violation of Section 8(a)(5). That is, even if the payments are lawful, the fund itself is a nonmandatory subject. It is a wholly union fund (there are no employer contributions), and thus it is not a term or condition of employment. Having said that, it may well be that a checkoff (payroll deduction) of employee contributions to the fund may well be a mandatory subject. The subject matter of checkoff concerns deductions from the paychecks of employees. There is at least a reasonable argument that such "paycheck" matters are a mandatory subject. Thus, for example, if an employee wishes to have money deducted and paid to a charity, or deposited into the employee's checking account, it is at least reasonable to conclude that the union can require the employer to bargain about this matter.

[1] *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941).

[2] Respondent may well have been obligated to bargain about a lawful replacement for the unlawful plan. However, there is no evidence that the Union sought such bargaining.

However, some mandatory subjects do not survive the expiration of the contract. Indeed, in the instant case, my colleagues agree that the obligation to checkoff union dues expired on the expiration of the contract.[3] Although it may be that the original basis for this principle was the relationship between checkoff of union dues and union security, the principle has been applied in a case without such a relationship, i.e., without a union-security clause. *Tampa Sheet Metal*, 288 NLRB 322, 326 fn. 15 (1988).

In light of *Tampa Sheet Metal*, it would be anomalous to hold that payroll deduction for voluntary union dues does *not* survive the expiration of a contract, while payroll deductions for other internal union matters *does* survive the expiration of the contract.

Accordingly, I conclude that the Respondent's obligation to deduct payments to the Union's fund involved herein expired with the contract.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT insist to impasse unlawfully over contributions to the Inter-Local Pension Fund, a nonmandatory subject of bargaining, over the Union's objection, and as a condition to reaching agreement on successor collective-bargaining contracts.

WE WILL NOT unilaterally implement the terms and conditions of employment of our final offer without having reached a lawful impasse and bargaining in good faith with the Union.

WE WILL NOT make retaliatory and regressive bargaining proposals.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL, on request of the Union, bargain collectively with the Union in good faith as the exclusive representative of our employees in the Photo-Engravers and Photo-Industrial units, as set forth below, without insisting to impasse unlawfully over contributions to the Inter-Local Pension Fund, a nonmandatory subject of bargaining, over the Union's objections, and as a condition for reaching agreement on successor collective-bargaining agreements, and if understandings are reached, embody such understandings in signed contracts:

> Photo-Engravers unit [set forth in Article 3, Section 1 of the Photo-Engravers Agreement]: All employees (including foremen) engaged to do the work which comes under the jurisdiction of the Graphic Communications International Union, shall without limitation, be covered by the terms of this contract; all work, processes, operations and products directly or indirectly in whole or in part incident to, associated with or related to Lithography, Offset (including dry or wet), Photo-engraving, Intaglio, Gravure, including without limitation any technological or other change, evolution of or substitution for any work, process, operation or product now or hereinafter utilized in any of the methods or for any of the purposes described above.
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> Photo-Industrial unit [set forth in Article 4, Section 4.1 of the Photo-Industrial Agreement]: All employees, excluding salesmen, journeymen, and apprentices.

WE WILL, on request by the Union, revoke giving force and effect to any unilateral changes in the terms and conditions of employment instituted in our final offer.

WE WILL, in the event of such revocation, make our employees whole for any loss of earnings and benefits they may have suffered as a result of such changes, with interest, less interim earnings.

WE WILL rescind our regressive and retaliatory bargaining proposal included in our letter of May 8, 1998.

QUALITY HOUSE OF GRAPHICS, INC.

Stephanie La Tour, Esq., for the General Counsel.
Allen B. Roberts, Esq. and *Gregory B. Reilly, Esq. (Roberts & Finger*), for the Respondent.
Thomas M. Kennedy, Esq. and *Ira Cure, Esq. (Kennedy, Schwartz & Cure),* for the Union.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of charges in Cases 29–CA–21820, 29–CA–21963, and 29–CA–22041, filed by Local One-L, Graphic Communications International Union (the Union or the Charging Party), on March 11, April 29, and May 26, 1998, respectively, against Quality House of Graphics, Inc. (the Respondent), a second

[3] *Bethlehem Steel*, 136 NLRB 1500 (1962).

consolidated amended complaint and notice of hearing was issued on July 29, 1998, alleging that the Respondent has been failing and refusing to bargain collectively with the Union as the representative of the Respondent's employees in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). By answer timely filed, the Respondent denied the material allegations in the second consolidated amended complaint, and raised various defenses.

A hearing was held before me in Brooklyn, New York, from November 16 to 18, 1998. Subsequent to the closing of the hearing the General Counsel, the Charging Party, and the Respondent filed briefs. In her brief counsel for the General Counsel moves for amendments to the transcript involving mostly spelling and other seemingly inadvertent mistakes in wording, none of which appears to alter the record evidence in any meaningful way. I therefore grant the motion since there also seems to be no opposition thereto from the other parties.

On the entire record and the briefs of the parties and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a New York corporation, with its principal office and place of business located at 47–47 Van Dam Street, Long Island City, New York (Long Island City facility), is engaged in the prepress preparation and production of printed materials. During the past year, the Respondent, in the course and conduct of its business operation, purchased and received at its Long Island City facility printing supplies and other products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York. The second amended complaint alleges and I find that the Respondent is now, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The second consolidated amended complaint alleges, the evidence in the record establishes and I find that the Union at all material times, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The second consolidated amended complaint alleges that the Respondent failed and refused to bargain in good faith with the collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act: by insisting to impasse on a nonmandatory subject of bargaining as a condition precedent to reaching final agreement on a successor collective-bargaining agreement; by unilaterally implementing its final offer notwithstanding that it could not lawfully insist to impasse over the nonmandatory subject of bargaining; by unilaterally ceasing to deduct and remit employees' dues payments to the Union without affording the Union an opportunity to bargain concerning the cessation of dues checkoff; and after being informed by Region 29 that it intended to issue a complaint, making regressive and retaliatory bargaining proposals.

A. The Evidence

Background

For many years, Local 1-P, Graphic Communications International Union (Local 1-P) had been recognized by the Respondent as the exclusive collective-bargaining representative of its employees, with such recognition embodied in successive collective-bargaining agreements the most recent of which was effective by their terms for a period from February 1, 1995, to January 31, 1998. These agreements, the Photo-Engravers Agreement and the Photo-Industrial Agreement, both contain a provision for a 30-day renewal after January 31, 1998, pending further negotiations. In or about October 1997, Local 1-P and Local One-L merged whereupon the employees were then represented by Local One-L, GCIU the Charging Party.

Both the Photo-Engravers and Photo-Industrial agreements contained union-security clauses requiring employees to become "members" or "members in good standing."[1] The Photo-Industrial agreement also includes a dues-checkoff provision requiring the Respondent to deduct payments from the employee's wages (when properly authorized) and to remit these payments to the Union. Robert Mitchell, vice president of the Union, testified that the parties have a separate dues-checkoff agreement for the Photo-Engravers' unit.

The units appropriate for the purposes of collective bargaining as set forth in these agreements are as follows:

Article 3, section 1 of the Photo-Engravers' Agreement provides:

> *Section 1*. All employees (including foremen) engaged to do the work which comes under the jurisdiction of the Graphic Communications International Union, shall without limitation, be covered by the terms of this contract; all work, processes, operations and products directly or indirectly in whole or in part, incident to, associated with or related to Lithography, Offset (including dry or wet), Photo-engraving, Intaglio, Gravure, including without limitation any technological or other change, evolution of or substitution for any work, process, operation or product

[1] It is well established that the only "membership" a contract may require as a condition of employment is so-called "financial core" membership, limited to the payment of periodic dues and initiation fees, *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963), as opposed to full union membership. The *Beck* case further established that unions may require agency-fee payers to pay only such representational costs as collective bargaining and contract administration. *Communications Workers v. Beck,* 487 U.S. 735 (1988). The United States Supreme Court has recently confirmed the facial validity of contract language requiring union "membership" as a condition of employment, holding that a union does not breach its duty of fair representation by negotiating a contract with "membership" language without also expressly explaining, in the contract, the limited meaning of such "membership" under the *General Motors* and *Beck* cases. *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998). Thus, the union-security language in the two contracts involved is facially valid. Furthermore, although the Union's security practices are not an issue in this case, it should be noted that GCIU gives agency-fee payers annual notice of their rights under *Beck.*

> now or hereinafter utilized in any of the methods or for any of the purposes described above.[2]

Article 4, section 4.1 of the Photo-Industrial Agreement includes:

> All employees, excluding salesmen, journeymen and apprentices.[3]

Depending on their respective bargaining unit, the Respondent's employees are covered by three pension plans. The Supplemental Disability and Retirement Fund (SRDF), the New York Commercial Photo-Engraver's Employer and Employee Retirement Fund (E&E), and the Inter-Local Pension Fund. The SRDF requires the Respondent to contribute 7 percent of the employees wages to the Graphic Communications International Union, AFL–CIO (GCIU), under both the Photo-Engraver and Photo-Industrial contracts. The E&E requires the Respondent to contribute $17 per week to this fund on behalf of employees in the Photo-Engravers unit only and did not apply to employees in the Photo-Industrial unit. The SRDF and the E&E Funds are employer-funded, "jointly trusted" trust funds. They have an equal number of trustees from the Union and employers within the industry, and are governed by collective-bargaining agreements and various trust documents.

The Inter-Local Pension Fund is distinct from the other two pension funds. Employers do not make any contributions to the Inter-Local fund. Rather, it is *union members* who contribute to this fund, as a condition of their union membership as required by the Union's bylaws. The Inter-Local trust fund does not have any employer-trustees, but consists only of union trustees from various GCIU locals. Moreover, unlike the two other pension funds described above, the Inter-Local fund is not a so-called Taft-Hartley fund. Additionally, the Inter-Local fund is not governed by any collective-bargaining agreements but is governed by the Union's constitution, bylaws, a trust indenture, and such Federal laws as ERISA and Section 501(c)(18) of the Internal Revenue Code. The amount that members must contribute to the Inter-Local fund is determined by the members themselves, under the Union's internal procedures,[4] and not by any collective bargaining with employers. Union members who work at Quality House of Graphics in the Photo-Engravers' unit pay $2.50 per week to the Inter-Local fund. Union members who work at Quality in the Photo-Industrial unit pay 2 percent of gross wages to the Inter-Local fund. These contribution rates were established under internal union procedures, specifically by a vote of members of the former Local One-P, and not established through collective bargaining with the Respondent. In fact, members' specific contribution rates to the Inter-Local fund are not even mentioned in the 1995–1998 collective-bargaining agreements.[5] Essentially, the Respondent has had no involvement whatsoever in the Inter-Local fund, except that members' contributions can be deducted from their pay and remitted to the Union under a check-off mechanism.[6]

It should be noted that the Respondent's employees are not required to participate in the Inter-Local fund as a condition of employment. Rather, participation in this fund is required only as a condition of *full union membership*. So-called "financial core" members are not required to participate and, in fact, Local One-L has financial core members at other shops that do not participate in the Inter-Local fund. Thus, although the 1995–1998 contracts require employees to become "members" (see fn. 1, above), these provisions could not and do not require all employees to become *full* union members and to participate in the Inter-Local fund. However, it appears that all Quality employees in both bargaining units are full union members, and therefore they all participate in the Inter-Local fund.

The Negotiations

In view of the January 1, 1998 expiration date of the Photo-Engravers and Photo-Industrial Agreements, in November 1997 the Union contacted the Respondent regarding the commencement of negotiations for new collective-bargaining agreements. Thereafter negotiation meetings between the parties were held from January to March 1998.[7] The parties' first negotiation meeting occurred on January 31, 1998, at the Respondent's premises. With the addition of one or two new representatives of the parties, at various times during subsequent negotiation meetings, the Union's and the Respondent's negotiating committee members remained the same. At this meeting the Respondent was represented by John Aslanian, owner; Nubar Nukashian, executive vice president, Douglas Schara, chief

[2] The Photo-Engraver employees (craft classifications) perform the actual color separation, the press work, and operations pertaining to the production of the work product. "[A]t the time of the impasse . . . [there were] approximately 85 employees in this unit (Unit A)."

[3] The Photo-Industrial employees (support unit), log in and catalog work, perform work other than crafts production and are also "shipping and maintenance people." At the time of the "impasse" there were approximately 50 employees in this unit.

[4] Specifically, Robert Mitchell, vice president of Local One-L, testified that each local or unit determines its own contribution rate. The Trust Indenture specifies a minimum of at least $2.50 per week, but members of a participating local may vote to increase their unit's contribution rate and Trust Indenture. Once the rate has been chosen by members in the local or other subgroup, all members in that group are required to pay the same rate; individual members cannot choose to contribute more or less than the officially determined rate. In early 1998, members of Local One-L voted to amend the Local's bylaws by increasing their contributions rate to 6 percent of gross wages; however, units that previously belonged to Local One-P before the union merger—such as members at Quality—were expressly exempted from that increase.

[5] The Photo-Engravers' contract does not mention the Inter-Local fund at all. The Photo-Industrial contract includes at art. 17, a check-off-type provision, requiring the Respondent to deduct and remit properly authorized contributions to the Inter-Local fund (formerly known under a different name), but it does not specify the contribution rate. Art. 17 states that "at least $2.50 per week" will be withheld from members' wages, whereas the actual rate for the Photo-Industrial unit is 2 percent of gross wages.

[6] Dues payments remitted by the Respondent go into the Union's general fund, whereas Inter-Local contributions go to the Inter-Local trust fund itself.

[7] Much of the following is based on the testimony of Robert Mitchell, the Union's vice president, and the exhibits in the record. However, during his testimony, Mitchell admitted that he did not remember the exact chronology of each of the eight bargaining sessions from January to March 1998, i.e., more than 8 months before the hearing.

financial officer, and Lori Montgomery, treasurer (and a principal of the Respondent). The Union was represented by Stanley Aslanian (no relation to John Aslanian), the Union's president emeritus, Patrick LoPresti, the Union's president, Robert Mitchell, the Union's vice president, and Louis Martino, shop delegate.

The Union presented a set of written proposals which included a "substantial" wage increase, increased contribution by the Respondent to the Union's Welfare Fund and the SRDF pension fund; upgrading the "desktop" employees (previously under the Photo-Industrial contract) by including them in the Photo Engravers contract; two additional paid holidays; allowing employees to get the maximum paid vacation after 1 year of employment; a seniority's layoff provision; and an increased night-shift differential. The Union explained its proposals and their importance but rather than considering the Union's specific proposals, the Respondent's representatives instead persisted in discussing the merger between Local 1-P and Local One-L and whether this merger would affect the negotiations and any resulting collective-bargaining agreement, and whether it would increase the chance of a strike. Moreover, while there had been no mention of the Inter-Local Pension Fund in the Union's initial proposals, the Respondent also expressed concern that the employee's contribution to the Inter-Local fund might be increased. However, Mitchell testified that the Union explained that the contribution rate for the Photo-Engravers and Photo-Industrial units of Local 1-P members could not be increased unless the members themselves voted to increase it.[8] The Union also explained that the contributions rate was a matter between the Union and its members, and had nothing to do with the Respondent or the merger.

The next negotiation session was held at the Respondent's premises on February 5, 1998. Chuck Appelian and possibly Tom Mustapich, both salesmen, joined the Respondent's negotiating team as did the Respondent's attorney, Allen Roberts. After a discussion regarding the presence of Roberts at the meeting, and the Respondent's assurance that it would not be detrimental to the negotiations, the Respondent requested some additional information concerning the benefit funds and a copy of the Union's constitution and bylaws. Previously the Union had already provided some information to the Respondent, such as the funds' IRS form 5500. At this meeting the Respondent questioned the financial status of the Union's Health and Welfare Fund and the E&E Pension Fund and the benefits that the funds dispersed. While Mitchell defended the financial stability of the Welfare Fund, with regard to the E&E Pension Fund he explained to the Respondent's representatives that this fund had three retirees for every active member, and it had been difficult to provide a larger benefit to participants in the fund because of the ratio of pensioners to active members.[9]. There was no resolution at this meeting of the pension issues and the Respondent neither presented any contract proposals nor responded to the Union's proposals. In fact, this meeting was almost entirely taken up with the Respondent's questions regarding the pension funds.

The third meeting occurred on February 10, 1998. In addition to the above-mentioned union representatives, two of the Union's attorney's, Ira Cure, and Lauren Esposito, also attended. Salesmen Chuck Appelian and Tom Mustapich also joined the Respondent's negotiating committee. The Union requested contract proposals from the Respondent, which as yet had not been forthcoming. Instead, the Respondent continued to request information from the Union. In response, the Union agreed to provide the Respondent with a copy of the galley proofs of its bylaws in this form, since the bylaws had been amended in November 1997, and were in the process of being printed in final form. However, the Union advised the Respondent unequivocally that the Union's bylaws were not any of the Respondent's business, and that the Union would not bargain over them.

After the parties discussed other requested information, the Respondent then presented its proposals, verbally and in writing. The Respondent's proposals included a general wage increase (unspecified), a merit-raise "pool," voluntary flextime, and a different health plan to be chosen by the Respondent. The Respondent also proposed significant changes in the pension plans, eliminating the Respondent's requirement to contribute to the SRDF and E&E Funds, and eliminating union members' requirement to contribute to the Inter-Local Fund. Mitchell testified that John Aslanian explained that the Respondent wanted employees to be able to put their contributions in a 401(k) plan for a substantial return on their money.[10] The Union rejected the Respondent's pension proposals, which essentially would eliminate the existing pension funds. Mitchell stated that he defended the value of the Union's maintaining the SRDF and E&E Funds, and as for the Inter-Local Fund the Union explained that the Respondent's proposal 6(c) regarding this fund would violate the Union's bylaws and the Inter-Local Fund trust indenture, and that besides, the Inter-Local Fund was an internal matter between the Union and its members, and did not involve the Respondent. However, none of the pension issues were resolved at the February 10, 1998 meeting.

The fourth meeting was held on February 17, 1998. The attorneys representing the Union were now Thomas Kennedy and Ira Cure. At this meeting the parties made additional requests for information and the Union provided the Respondent with galley proofs of its bylaws and a copy of its constitution reiterating that these were not a subject of bargaining. While the Respondent also provided some information that the Union had

[8] The Photo-Engravers and Photo-Industrial units, each paid a different contribution rate to the Inter-Local Pension Fund as indicated hereinbefore.

[9] Mitchell acknowledged that the Union was aware of general dissatisfaction by some of the union members regarding the pension fund's "bad treatment" of them under the former ALA Local 1 which subsequently became known as Local 1-L.

[10] The Respondent's pension funds proposals were:

> 6(a) Utilizing the contribution currently being made to the Supplemental Retirement and Disability Fund (7 percent of scale) to Quality employees in the form of a salary increase; (b) Utilizing the contribution currently being made to the "Employers and Employees Fund" (up to $17/week) to Quality employees in the form of a salary increase; (c) Making the 2-percent involuntary contribution to the "Inter-Local Pension Fund" a voluntary con tribution.

requested, Mitchell testified that the Union complained to the Respondent that the parties had not really been bargaining and the information sought by the Respondent could have been obtained on request much earlier. The Union also complained that the Respondent had not made a specific wage proposal as yet. During the negotiation session the Union withdrew its proposal for additional holidays and offered a wage proposal for a 5-percent wage increase. The Respondent amended its health benefit proposal to permit input by the Union regarding the choice of health insurance, withdrew it flextime proposal, and the parties discussed the Union's vacation proposal. According to Mitchell the Respondent explained that it wanted to make pension contributions to the funds "voluntary" so that employees could choose whether to contribute to the existing funds, to a 401(k) plan, or to accept the contributions as a wage increase.

However, the Union explained that with regard to these pension funds the SRDF could accept contributions only from employees under valid GCIU collective-bargaining agreements,[11] that the SRDF's rules did not allow individual employees to make contributions, and that the local union was not in a position to bargain over the rules of this International Trust Fund in Washington, D.C. The Union also reiterated that as concerns the Inter-Local Fund, union members' contributions are set by a vote of the entire Local; that there is no provision for individual choice in that sense; and that full membership in the Union requires a contribution to this fund. The Union also again made it clear that besides, this was solely between the Union and its members, and that the Union did not intend to bargain over its constitution and bylaws. Nevertheless, the Union agreed to consider bargaining over the E&E Fund, since it was a local fund over which the parties could exercise some control by virtue of having three of its four trustees.[12] Mitchell testified that he believed that while the Union wanted to talk about wage proposals, it was at this meeting that Chuck Appelian stated that wages would not be a "problem" but that pensions were the "logjam" issue. He also stated that most of this meeting was again taken up with a discussion of the pension issues as in the previous meetings.

The fifth negotiation session took place on February 24, 1998, at the Respondent's premises. It was at this meeting that the Respondent made its first wage proposal. Again the pension issues were discussed with the parties exploring the possible annuitization of the E&E Fund. The Union again reiterated that the SRDF Fund could not be changed and that the Inter-Local Fund was strictly between the Union and its members, and was not an appropriate subject for bargaining. The Respondent's witness, Douglas Schara, confirmed that Union President Emeritus Stanley Aslanian had warned the Respondent that it would require a change in the rules and regulations of the funds to permit voluntary contributions. Mitchell testified that the pension issue was a "hard-nut issue" and was considered all through the negotiations. Moreover, Mitchell also testified that this may have been the meeting (if not February 26) wherein John Aslanian the Employer's principal, first announced that "[w]e're at impasse over these pensions."[13] The parties continued their discussion of the health insurance fund with the Respondent insisting that all contributions be used for the benefit of the Respondent's employees only. The meeting ended without any resolution of the pension issues.

The sixth negotiation session occurred on February 26, 1998. The Respondent distributed a written modification of its health-benefit proposal, which the parties discussed. Mitchell testified that there was an extensive discussion of the wage issue with the Union seeking a percentage increase and the Respondent wanting to discuss a flat dollar increase. Mitchell recalled that Chuck Appelian again, as on a number of prior occasions, stated that "Wages are not the real issue here," and John Aslanian perhaps at this meeting said, "We were at impasse over the pensions."

Mitchell testified that the Respondent wanted employees to have choices regarding their contributions including a 401(k) plan and complained that the pension plans as constituted were too restrictive on the employer. The Union's attorney, Kennedy, proposed that the Union might possibly consider the annuitization of the E&E Fund, but that the Union had no control over the SRDF, and that the Inter-Local Fund was an internal union matter. Mitchell testified, "The Inter-Local Fund is . . . a part of our by-laws. It is a union fund run by the union contributions by union members, and we are not going to negotiate. That was not any business of the company." The Union's attorney, Kennedy, at one point during the meeting, again offered that the Union would consider the possible annuitization of the E&E Fund if the Respondent would withdraw its proposals regarding the SRDF and Inter-Local Funds (proposals 6(a) and (c), respectively). The Respondent refused and the meeting ended with no resolution of the pension issues.

The seventh negotiation meeting was held on March 3, 1998, at the Union's office. Mitchell testified that some progress was made on certain issues, including the Respondent's withdrawal of its health-benefit proposal and the Union's withdrawal of its night-shift differential proposal. The parties also appeared to agree on the vacation issue. However, the Respondent remained adamant on its position regarding the pension issues, which remained unresolved between the parties. Mitchell related that Chuck Appelian made a long speech, stating that the employees should have a choice as to whether they wished to contribute to the Inter-Local Fund. Then the Union's attorney, Kennedy, and Stanley Aslanian, both pointed out that the Respondent was seeking a change in the Union's bylaws, and that the Union would not negotiate its bylaws with the Respondent. The Respondent also amended its proposal regarding the Inter-Local Fund 6(c) to provide that any contribution to this fund be voluntary and that any increase in the amount be subject to "each individuals' consent." At some point during this meeting the Union agreed to allow the Photo-Engravers to choose to put the former E&E Fund contributions ($17 per week) into a

[11] This was later confirmed by the SRDF administrator.

[12] The Employers and Employees Fund is located in New York and of the four trustees, two trustees (Stanley Aslanian and Robert Mitchell) were from Local One-L, and one trustee (Joan Botty) was from Quality House of Graphics, Inc.

[13] Schara's notes of the negotiations on February 24, 1998, although rhetorical, states, "Can negotiations break down because of this?"

401(k) plan, if the other pension proposals by the Respondent were taken off the table. After a "sidebar" (or off the record) meeting between Stanley Aslanian for the Union, and John Aslanian and Nubar Nakashian for the Respondent, failed to resolve the pension issues, the meeting ended.

The eighth and final negotiation session took place on March 9, 1998, at the Union's office. Mitchell testified that the Union made a "comprehensive" proposal that included a $35-wage increase for the Photo-Engravers, a $20-wage increase for the Photo-Industrial employees; the inclusion of the desktop employees into the Photo-Engravers unit; and proposals regarding personal days and vacation time. Moreover, the Union proposed to annuitize the E&E Fund if the Respondent would withdraw its proposal affecting the SRDF 6(a) and Inter-Local Funds 6(c) in its bargaining offer. Mitchell stated that some of the above issues were resolved by the parties including the outstanding Health and Welfare issues, but the Respondent still refused to withdraw its proposals regarding the SRDF and Inter-Local Funds. However, Mitchell related that the Union felt that if the pension issues, "the crux of the negotiations," could be resolved, the parties could agree on successor collective-bargaining agreements.

The Respondent's offer to the Union encompassed a wage increase of $20 per week for Photo-Engraver employees, a $15-per week increase for photo-industrial employees, and a $20-wage increase for desktop workers. The Respondent also offered to extend the more generous Photo-Industrial vacation policy to the photo-engraver employees, and give desktop employees covered by the Photo-Industrial collective-bargaining agreement 5 personal days as enjoyed by the Photo-Engraver employees. However, the Respondent's position regarding its proposals affecting the pension issues remained the same, namely, that employee contributions to the SRDF would be on a voluntary basis, with employees in both the Photo-Engraver and Photo-Industrial units having a choice as to whether they wished to continue contributions to the SRDF fund, opt for a 401(k) plan, or have the amount added to their pay, and to "make the 2 percent involuntary contribution to the 'Inter-Local Pension Fund' a voluntary contribution."

Mitchell testified that at one point during this meeting either Chuck Appelian or Allen Roberts asked whether the Union felt that the parties had "come to a wall on the pensions and at these negotiations," and the Union's attorney, Ira Cure, responded, "Well, we are not drawing any lines in the sand," but that the Union could go no further on the pension issue. Cure repeated that the Respondent would have to withdraw its proposals 6(a) and (c) which were unacceptable to the Union, again explaining that the SRDF and Inter-Local Funds could not be made voluntary as proposed by the Respondent, and that contributions to the Inter-Local Fund were mandated by the Union's bylaws and therefore were an internal union matter, and as such, none of the Respondent's business.

Mitchell testified that the union representatives then caucused and on their return were told by the Respondent's representative Chuck Appelian that he felt that "we had gone as far as we could and that the Company was now going to implement its final offer." In addition to the wage increases, additional personal days, and more generous vacation policy set forth in its above final offer, the Respondent also stated that it would make all contributions to the pension funds voluntary and would no longer make the required contributions to the SRDF and E&E Funds. Instead the employees would have a choice of continuing to contribute to these funds, or to receive the amount of the contributions, if not accepted by the SRDF[14] or the E&E Funds as additional pay, or to place these amounts for the employees in a 401(k) plan. The Respondent also announced that it would no longer deduct and remit employees' Inter-Local Fund contributions to the Union. On hearing this, the union representatives got up and left the room ending the negotiation session. As Mitchell testified, "Not that we had resolved all the issues, but from our side of the table, we felt we were close enough on the other issues that could we get these pensions resolved, we could possibly get a contract."

It should be noted that, during all of the negotiating sessions (January to March 9, 1998), the Respondent never proposed eliminating the contract's provisions for union security and dues checkoff, nor had this issue ever arisen in the discussions between the parties. However, after the parties' contracts had expired, including the 30-day extension, the Respondent ceased deducting and remitting employees' dues payments to the Union. It also should be noted that there was no evidence in the record that any employee had revoked his dues-checkoff authorization. Moreover, the cessation of dues deductions and remittance to the Union was not part of the Respondent's final offer.

What Occurred after March 9, 1998

By memorandum dated March 11, 1998, from Douglas Schara, the Respondent notified all its bargaining unit employees of the terms of its final offer that would be implemented following the expiration of the collective-bargaining agreements and of the "impasse" in negotiations on March 9, 1998.[15] The employees were also given forms on which to choose the method of distributing their pension contributions. The Respondent then implemented its final offer thereafter as of March 1, 1998, discontinuing the 7-percent contributions to the SRDF required to be made for both bargaining unit employees and allowing employees to choose whether to continue such contributions in the SRDF or an equivalent 401(k) option or a pay increase; discontinuing the $17-per-week contribution to the

[14] The Respondent advised the Union that it would implement its proposal regarding the SRDF contributions on March 1, 1998, and if the SRDF did not accept the contribution, the Respondent would add that amount to the employees pay. Since under Federal law the SRDF can accept contributions only from employees under a GCIU collective-bargaining agreement, the SRDF was forced to return individual employee's contributions who chose to continue their contributions to the SRDF Fund.

[15] This case is interesting in that all parties acknowledge the existence of an "impasse" reached on March 9, 1998. However, the General Counsel contends that the Respondent unlawfully bargained to impasse on a nonmandatory subject of bargaining as a condition precedent to reaching a final agreement, the Union supporting and agreeing with the General Counsel's position. Contrary to this the Respondent instead maintains that a lawful impasse was reached on a mandatory subject of bargaining and therefore no violation occurred when the parties bargained to impasse on March 9.

E&E Fund on behalf of employees in the Photo-Engraver's unit and giving the money instead to employees as a wage increase; and discontinuing deducting and remitting the 2-percent union member's contribution to the Inter-Local Fund. The Respondent also notified employees in both bargaining units that it would no longer automatically deduct dues from the employees' paychecks and remit dues payments to the Union.[16] Employees were additionally directed to their union representative for any questions or further details regarding these changes.

On March 10, 1998, the Union filed charges against the Respondent in Case 29–CA–21820 alleging, inter alia, the Respondent's unlawful insistence to impasse over the Inter-Local Fund as a nonmandatory subject of bargaining. On April 29, 1998, the Union filed a charge in Case 29–CA–21963, alleging the Respondent's unilateral action in ceasing to deduct and remit dues to the Union from the employees pay. During the investigative stage of the unfair labor practice charges by Region 29, Board Agent Ann Lesser, and the Respondent's attorney, Allen Roberts, discussed the Respondent's position as to the Inter-Local Fund contributions being a nonmandatory or mandatory subject of bargaining. The Respondent submitted that the Inter-Local Fund was a mandatory subject of bargaining, that the Respondent's insistence on employee choice with respect to the mandatory 2-percent contributions required by union membership could be addressed with its proposal that union membership become voluntary through elimination of the union-security clause, and that its intent was not to "meddle" in the internal affairs of the Union.

At the trial, Attorney Roberts testified that on May 6, 1998, Lesser called him on two occasions and advised that the Region was likely to issue a complaint in the case and that the Union was asking the Region to seek injunctive relief under Section 10(j) of the Act. Roberts stated that having 1 week to respond to the possible issuance of the complaint and a 10(j) petition and on his recommendation to the Respondent, by letter dated May 8, 1998, Respondent Executive Vice President Nubar Nakashian wrote to Union President Patrick LoPresti, proposing for the first time the elimination of union, security, and dues-checkoff provisions from the proposed contracts. Roberts related that "I thought we had a proposal that would bring them back to the table," and characterized the proposal in the letter as being an "impasse breaking proposal," and one indication that the Respondent had "no intention of bargaining about . . . subjects that relate to internal union affairs." The Respondent also asked in the letter that the union contact it regarding resumption of the negotiations and any request to "discontinue the pay and benefits practices implemented after March 9 consistent with Quality's last offer" for the Respondent's consideration. However, the Union did not request any further bargaining in response to the Respondent's May 8, 1998 letter and no further bargaining sessions were held between the parties after the March 9, 1998 bargaining meeting.

Credibility

Regarding the credibility of the respective parties' witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole, *New York University Medical Center*, 324 NLRB 887 (1997), enfd. 156 F.3d 405 (2d Cir. 1998); *Gold Standard Enterprises,* 234 NLRB 618 (1978); *V&W Castings,* 231 NLRB 912 (1977); and *Northridge Knitting Mills,* 223 NLRB 230 (1976).

The General Counsel's sole witness was the Union's vice president, Robert Mitchell. While his testimony at times evidenced instances of a lack of remembrance and at other times admittedly omissions in his notes of the bargaining sessions,[17] still, I found that his testimony was given in a forthright manner, with an intent to honestly and as completely as possible explain what had occurred at the negotiation meetings between the parties and therefore quite believable and credible. Fur-

[16] The "Dues Check-Off" provision in the Photo-Industrial Agreement between the parties provides: Art. 6

6.1 The Company agrees that upon receipt of written authorization, the Company will deduct Union dues monthly in the amount specified in said authorization, and transmit same to the Union.

6.2 Such authorization shall not be revocable for a period of one year or until the termination date of this contract or renewal thereof, whichever is earlier, and the revocation shall not be effective until ten (10) days after written notice thereof has been given to the Company.

This language also appears in a "Dues Check-Off Agreement" dated January 18, 1988, between the Respondent and Local 1-PGCIU. The checkoff-authorization card admitted into evidence as representative of the current card in use by the Union was as follows:

TO BE SIGNED AND DELIVERED TO COMPANY BOOKKEEPER
CHECKOFF AUTHORIZATION

LOCAL ONE, AMALGAMATED LITOGRAPHERS OF AMERICA

TO: *Quality House of Graphics* DATE: *January 20, 1998*
Name of Company

I hereby authorized you to deduct union monthly dues from my wages paid on the first day in each month, and to make weekly deductions of Union assessments from my wages, in the amounts specified in writing by Local One, and direct that you remit same to Local One.

This authorization shall remain in effect unless and until revoked by me as hereinafter provided and shall be irrevocable for a period of one (1) year from the date hereof or until the termination of the collective-bargaining agreement between the Company and Local One, whichever occurs sooner.

I further agree and direct that this authorization shall be automatically renewed for successive periods of one (1) year or for the period of each succeeding applicable collective bargaining agreement, whichever is shorter, and shall be irrevocable during each such renewal period, unless written notice of revocation is given by me to the Company and Local One not more than twenty (20) days and not less than ten (10) days prior to the expiration of each renewal period of one (1) year or prior to the termination of each renewal applicable collective bargaining agreement, whichever occurs sooner.

Gary Russo Gary Russo 143 66-315
Member's Signature (Signed) Print Members's Name No.

[17] Mitchell explained that he did not write down everything word for word during the negotiations.

thermore, of significance in crediting Mitchell's testimony is the Respondent's failure to call either John Aslanian, its owner; Nubar Nakashian, its executive vice president; or Chuck Appelian who were present at the negotiations, as a witness to rebut Mitchell's testimony as given herein, although they each were knowledgeable regarding the negotiations and might well have been able to specifically detail and/or clarify what had occurred.[18] Moreover, the Respondent called three witnesses, CFO Doug Schara, Joseph Barclay, a member of the bargaining unit, and Allen Roberts, the Respondent's attorney. The testimony of these witnesses generally either corroborated or left unrebutted that of Mitchell's.[19]

This is not to say that I disbelieved all the testimony of the Respondent's witnesses. Their testimony covered mostly events occurring after the negotiations had ended on March 9, 1998. While Schara's testimony generally concerned the Respondent's efforts after March 9, 1998, to implement the Respondent's final offer he also testified somewhat about what occurred at the negotiations. Barclay testified about the Union's reactions following the impasse, and Roberts related his discussions with the investigating Board agent and the Respondent's attempts to circumvent the Region's issuance of a complaint and a 10(j) petition, by proposing to break the impasse and recommencing negotiations. However, based on their demeanor and other facts in the record, I found these witnesses to be less trustworthy.

B. Analysis and Conclusions

The second consolidated amended complaint alleges that the Respondent has failed and refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act, by unlawfully bargaining to impasse on a nonmandatory subject of bargaining, namely, the issue of the Inter-Local Pension Fund, as a condition precedent to reaching final agreement on successor collective-bargaining agreements; by implementing unilaterally its final offer at a time when no legitimate impasse had been reached and without affording the Union the opportunity to bargain further with it; by unilaterally ceasing the deduction and remittance of employees dues payments to the Union,[20] without affording notice to the Union and the opportunity to bargain with it concerning the discontinuance of dues checkoff; and by making a regressive bargaining proposal after being informed of the Region's intention to issue a complaint.

The Impasse Issue

Sections 8(a)(5) and 8(d) of the Act require an employer to bargain in good faith with the collective-bargaining representative of its employees with respect to wages, hours, and other terms and conditions of employment.[21] As the United States Supreme Court stated in *NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 349–350 (1958):

> Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours and other terms and conditions of employment." The duty is limited to those subjects, and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal, which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.
>
> . . . .
>
> Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether . . . a subject [falls] within the phrases "wages, hours and other terms and conditions of employment" which defines mandatory bargaining.

From the above, it is clear that while employers and unions are also permitted to make proposals and bargain over so-called "nonmandatory" or "permissive" subjects, neither party may lawfully insist on a nonmandatory provision over the other party's objection as a condition to reaching an overall agreement and such insistence to impasse on a nonmandatory topic constitutes, in effect, an unlawful refusal to bargain over the mandatory subjects.[22]

Pension and insurance benefits for active employees have been held to be mandatory subjects of bargaining as concerning "other terms and conditions of employment.[23] However, an issue in this case is whether the Respondent failed and refused

[18] From the failure of a party to produce material witnesses or relevant evidence obviously within its control without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. *7-Eleven Food Store,* 257 NLRB 108 (1981); *Publisher Printing Co.*, 238 NLRB 1070 (1977).

[19] For example, Schara's notes confirmed Mitchell's testimony that the parties believed that agreement could be had on wages but the problem of the pension funds was the "sticking point." His notes and testimony also show that the Union had consistently maintained that for contributions to the pension funds to become voluntary, the pension fund would have "to revise its rules and regulations," and that the parties were at impasse. Additionally, the Respondent stipulated that, prior to the March 9 impasse, it had never proposed eliminating or modifying the contracts' union-security and dues-checkoff provisions as part of any proposal.

[20] The collective-bargaining agreements which expired on January 31, 1998, contained union-security clauses and employees dues payments were deducted and remitted to the Union pursuant to voluntary written authorizations from the employees in units A and B.

[21] Sec. 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

Sec. 8(d) of the Act defines collective bargaining as follows:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[22] *NLRB v. Borg-Warner*, supra.

[23] *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971).

to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act by insisting to impasse on an alleged nonmandatory subject of bargaining, namely, the Inter-Local Pension Fund. The General Counsel and the Union assert that the Inter-Local Pension Fund contributions constitute a nonmandatory subject of bargaining since it "deals only with relations between the employees and their union."[24] The Respondent, instead, alleges that the Inter-Local Fund contributions of its employees, "are part and parcel of their overall employment terms and conditions and hence a well-established subject of mandatory bargaining."[25]

Both the courts and the Board have held that strictly internal union matters between a union and its members are nonmandatory subjects of bargaining over which an employer may not hold a contract hostage. For example, in *Borg-Warner,* supra, the employer insisted, as a condition of reaching agreement, on a contractual "ballot clause" provision setting certain requirements and procedures for a strike vote. The union made it clear that it would not accept the proposed ballot clause under any circumstances. The Supreme Court held that the ballot clause did not concern any term or condition of employment, but rather, that it concerned only the relations between employees and their union. The Court thus found that the employer violated Section 8(a)(5) of the Act by insisting to impasse over the inclusion of the ballot clause, a nonmandatory subject of bargaining. Also in *Betra Mfg. Co.*, 233 NLRB 1126 (1977), enfd. 624 F.2d 192 (9th Cir. 1980), cert. denied sub nom. *Thomas v NLRB,* 450 U.S. 966 (1981), the employers unlawful insistence on a contractual clause providing that any change in the union's constitution, bylaws or affiliation would invalidate the contract was found to be a violation of Section 8(a)(5) of the Act since this involved the matter of the Union's "internal structure or rules" which constituted a nonmandatory subject of bargaining, dealing with "relations between employees and their union." (Citing *Borg-Warner*, supra.)[26] Similarly, in *Universal Oil Products*, 179 NLRB 657 (1969), enfd. 445 F.2d 155 (7th Cir. 1971), the Board held that the employer violated Section 8(a)(5) of the Act by insisting as a condition of reaching a collective-bargaining agreement, that the union withdraw fines it had imposed against members who crossed a picket line and returned to work during a strike. The Board found the subject of a union's fines against its own members to be a nonmandatory subject of bargaining.

Moreover, a policy explicitly incorporated into the Act by Congress is the avoidance of "outside interference in union-decision making."[27] Therefore, the proviso to Section 8(b)(1)(A) of the Act protects "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." As a result, internal affairs of labor organizations are not "an aspect of the relationship between the employer and the employees,"[28] but rather, by statutory definition are encompassed by the relationship between labor organization and employees. It follows that subjects embraced by the internal affairs proviso are nonmandatory ones, which concern relations between the employees and their union and not mandatory subjects regarding the employees and their employer.

The record evidence in this case establishes that the Inter-Local Pension Fund is an internal union matter, involving only the Union's relations with its members. Contributions to the Inter-Local Fund are made by union members only and not by the Respondent or any other employer. The fund is neither created nor governed by any collective-bargaining agreement, and the right to participate in the Inter-Local Fund is governed only by the Union's constitution and bylaws, and has nothing to do with the employees' terms and conditions of employment.[29] "Financial-core" members who choose not to become full union members are not required to participate. The Inter-Local Fund is merely a supplemental pension program that the Union established as part of full union membership with the level of contributions required determined by the union members themselves under the Union's own internal rules.[30] The Respondent has no involvement whatsoever in the Inter-Local Fund except that, as a convenience, it deducts members' contributions from their earnings and remits the contributions to the Union under a checkoff type mechanism. Thus, the Inter-Local Pension Fund is an internal union matter over which, as a nonmandatory subject of bargaining, the Respondent may not legally insist to impasse.

The evidence herein shows that the Respondent throughout the negotiations indeed insisted to impasse on its pension proposals, including its proposal to make the Inter-Local Fund "voluntary" for union members. During the negotiations the Respondent refused to withdraw its proposal 6(c), despite the Union's repeated objections that the Inter-Local Fund was an internal matter between the Union and its members, governed

[24] *Borg-Warner,* supra at 350.

[25] Citing *Ford Motor Co. v. NLRB,* 441 U.S. 488 (1979); *Pittsburgh Plate Glass,* supra*; Handleman Co.*, 283 NLRB 451 (1987); and *NKS Distributions, Inc*., 304 NLRB 338 (1991).

[26] Also see *Houchens Market of Elizabethtown, Inc.,* 155 NLRB 729 (1965), enfd. 375 F.2d 208 (1967) (employee ratification of contract, a nonmandatory subject of bargaining); *Service Employees Local 535 (North Bay Regional Cente*r), 287 NLRB 1223 (1988), enfd. 905 F.2d 476 (D.C. Cir 1990), cert. denied 498 U.S. 1082 (1991) (amount of union's "agency fees" a nonmandatory subject of bargaining); *Bricklayers,* 306 NLRB 229 (1992) (amount of union dues a nonmandatory subject); and *Torrington Industries,* 307 NLRB 809 (1992) a union's selection of its steward/grievance representative a nonmandatory subject of bargaining).

[27] *NLRB* v. *Food & Commercial Workers Local 1182*, 471 U.S. 1098 (1986).

[28] C*hemical Workers v. Pittsburgh Plate Glass,* supra.

[29] Also see *Internal Revenue Code* Sec. 501(c)(18) which provides a tax exemption for certain trusts funded only by contributions of employees.

[30] Sec. 8(b)(1)(A) of the Act states that it "shall not impair the right of a labor organization to prescribe its own rules with respect of the acquisition or retention of membership therein." Moreover, in *Scofield v. NLRB*, 394 U.S. 423 (1969), the Supreme Court upheld a union's right to enforce a rule regarding membership, as long as the rule is "properly adopted," "reflects a legitimate union interest," "impairs no policy Congress has imbedded in the labor laws," and is "reasonably enforced against union members who are free to leave the union and excape the rule." 394 U.S. at 430, 470.

by the Union's bylaws and procedures and that the Inter-Local Fund was none of the Respondent's business. Moreover, the Union advised the Respondent that it would not bargain with the Respondent over changes in its by laws and membership requirements as would be required under the Respondent's pension proposals. It became clear to the parties that the pension issues (including the Inter-Local Fund) became the "sticking point" or "logjam" in the negotiations and wages were not the "problem." The Respondent continued to insist that contributions to the Inter-Local Pension Fund be made voluntary as well as other pension proposals as a condition for reaching overall bargaining agreements. The Respondent's proposal 6(c) regarding the Inter-Local Pension Fund remained as part of the Respondent's final offer when it declared impasse at the last negotiation session on March 9, 1998. The Respondent's insistence on what amounted in affect to a change in the Union's internal membership requirements and rules (that contributions to the Inter-Local Pension Fund be made voluntary) found herein before to be a nonmandatory subject of bargaining and on which the Respondent could not lawfully insist to impasse, constituted a violation of its duty to bargain in good faith within the meaning of Section 8(a)(5) of the Act.[31]

The Respondent in its brief states that the Inter-Local Pension Fund contributions of its employees are part of their employment terms and conditions and "hence a well-established subject of mandatory bargaining, *Pittsburgh Plate Glass*, 404 U.S. at 180 . . . irrespective of whether the funding of those benefits is employer contributions or employee payments in the form of a mandated payroll deduction." The Respondent continues:

> Quality's proposal with respect to the Inter-Local Fund—consistent with its concededly lawfull SRDF proposal—took note of this judicially recognized reality. Because the Inter-Local Fund—unlike the SRDF—did not entail employer contributions, Quality presented across the bargaining table a Photo-Industrial proposal accomplishing the same end: employees would have an opportunity for the "2% involuntary contribution" to the Inter-Local Fund to be voluntary.

However, as found by me above, contributions to the Inter-Local Fund was a nonmandatory subject of bargaining to which the Respondent could not insist to impasse. Moreover, the fact that the Respondent's proposal 6(a) regarding the SRDF also contributed to the impasse does not preclude a finding that the Respondent bargained unlawfully with regard to the Inter-Local Fund. The Board has consistently held that "[w]here an impasse has been created even in part by insistence on bargaining about a permissive subject, such an impasse is not valid under the Act."[32] Insisting to impasse on a nonmandatory subject is a per se violation of Section 8(a)(5) of the Act, regardless of what other issues may still have been in dispute at the time of the impasse.[33]

The Respondent, in support of its position herein also cites *NLRB v. General Motors Corp*., 373 U.S. 734 (1963). In that case the Supreme Court stated:

> Under the second proviso to Section 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. "Membership" as a condition of employment is whittled down to its financial core.

Moreover, the United States Court of Appeals in *William v. NLRB*, 105 F.3d 787, 792 (2d Cir. (1996) (citing *Communications Workers v. Beck*, 487 U.S. 735 (1988), said, "[U]nder Section 8(a)(3), the 'membership' that can be required by a union-security clause and from which an employee cannot resign includes the obligation to pay diminished dues to support union activities that are germaine to collective bargaining, contract administration, and grievance adjustment."[34]

From the above, the Respondent argues that this "financial core" does not include the obligation to support nonrepresentational union activities beyond those germaine to collective bargaining, contract administration, and grievance adjustment.[35] The Respondent maintains that the Inter-Local Pension Fund contribution have nothing to do with union dues and instead, relate directly to the employer-employee relationship, and that its proposal 6(c) concerning the Inter-Local Fund contributions was clearly within the ambit of lawful, mandatory bargaining.[36]

However, it should be remembered that pursuant to the second proviso of Section 8(a)(3) of the Act, under a union-security clause employees are only obligated to join the Union as "financial core" members. Herein only those voluntarily choosing to join the Union as full members were subject to the Inter-Local Pension Fund contributions. Clearly, the latter relationship applied solely to the Union and its membership. Moreover, as found above, the Inter-Local Pension Fund was an nonmandatory subject of bargaining and the Respondent's insistence to impasse over this issue as a requirement to negotiating successor collective-bargaining agreements was unlawful.

The Respondent also asserts that since its proposal 6(c) only referred to the Photo-Industrial employees' contributions to the Inter-Local Pension Fund (2 percent) therefore, "because Inter-Local contributions were not an issue in the Photo-Engravers negotiations, there is no factual or legal support for a claim that impasse was unlawful." I do not agree.

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[31] *Borg-Warner Corp.,* supra*; Betra Mfg. Co.,* supra*; Universal Oil Products,* supra*; Houchens Market of Elizabethtown, Inc*.; supra*; Bricklayers,* supra*; Torrington Industries,* supra; and *Service Employees Local l535 (North Bay Regional Center),* supra.

[32] *Retlaw Broadcasting Co.,* 324 NLRB 138 (1997), citing *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988) ("none of the terms of the final offer predicated on such an improper impasse can be lawfully implemented"); *Boise Cascade Corp*., 283 NLRB 462 (1987). Also see *Betra Mfg.,* supra.

[33] "[A] permissive subject of bargaining [does not] become mandatory [merely because] it [is] presented together with a mandatory subject," *Borden, Inc*., 279 NLRB 396 (1986).

[34] *Communications Workers v. Beck*, 487 U.S. at 745.

[35] *Communications Workers v. Beck*, supra.

[36] The Respondent cites *Ford Motor Co. v. NLRB*, 441 U.S. at 501, and *Handleman Co.,* supra. Both cited cases are easily distinguishable since the subject in question in *Ford* was a plant food provision and in *Handleman* a stock purchase program, benefits conferred by the respective employers on the employees that was in the employer's control.

According to the uncontroverted testimony of Mitchell, throughout the negotiations the Respondent insisted that *all* its employee contributions to the Inter-Local Pension Fund be voluntary. This included employees of both the Photo-Industrial and Photo-Engraver units, without distinguishing between the Photo-Industrial and Photo-Engravers collective-bargaining agreements. Notwithstanding that its proposal 6(c) related only to the Photo-Industrial Inter-Local Pension Fund contributions, and I am aware that there were aspects of the two bargaining agreements that were being negotiated separately, still the Respondent's bargaining position on the Inter-Local Pension Fund throughout the negotiations and on March 9, 1998, when its impasse declaration ended the negotiations for good, was that all Inter-Local Fund contributions should be made voluntary. It is clear from the record that this affected dramatically the entire negotiations for the two new successor agreements. The Respondent's insistence to impasse on a nonmandatory subject of bargaining, as found by me above, which in effect concerned both agreements, violated Section 8(a)(5) of the Act.

The Respondent additionally alleges that to the extent the Photo-Industrial negotiations reached impasse over the Inter-Local Pension Fund contributions, it is because the Union "knowingly misrepresented" to the Respondent that particpation in the Inter-Local Fund was a mandatory incident of union membership and could not be made voluntary under the Union's bylaws. The Respondent maintains that by failing to mention to the Respondent that "financial core" members are not required to contribute to the Inter-Local Pension Fund the issue of the Inter-Local Fund contributions remained an active topic of discussion because of the Union's "misrepresentation about the availability of voluntary participation."

However, I do not understand, nor does the Respondent in its brief clarify, how the Union's failure to disclose the fact at the negotiation meetings that "financial core" members were not required to contribute to the Inter-Local Pension Fund could have changed either the Union's position during the negotiation sessions that the Inter-Local Fund was strictly an intraunion affair between it and its union members, and the Respondent's insistence that all contributions to this Fund be made voluntary. True to its bylaws as indicated to the Respondent, full union members were obligated to contribute to the Inter-Local Pension Fund and despite the exclusion of "financial core" members in this respect, it changed nothing and still required the Union to amend its bylaws to comply with the Respondent's bargaining demand as to making voluntary, employee contributions to the Inter-Local Fund. Under *NLRB v. General Motor Corp.*, supra, the only membership a bargaining agreement can require as a condition of employment is a "financial core" membership, limited to the payment of periodic dues and initiation fees and employees cannot legally be required as a condition of employment to join the union as full members. But, once employees have chosen to join as full members, the union can prescribe its own rules with respect to those members, including participation in the Inter-Local Pension Fund.

The Respondent raises other issues in its brief all based on its assertion that the Inter-Local Pension Fund contributions were a mandatory subject of bargaining. For example: that the Union's adoption of bylaw provisions with respect to mandatory bargaining subjects (Inter-Local Pension Fund contributions) can not operate to strip those topics of their statutorily created status as mandatory subjects of bargaining.[37] Moreover, the Respondent states that not only do the payments to the Inter-Local Fund fail to qualify as statutory "membership dues,"[38] but they fail to conform to the mandate of Section 302 of the Act because the Inter-Local Fund does not satisfy threshold requirements of protective provisions of Section 302(c)(5)(B). The Respondent continues that because payments to the Inter-Local Fund are not to be equated with membership dues, there is no legitimacy to an allegation that it was subject to an 8(a)(5) obligation to make Inter-Local Fund remittances as it did with membership dues or was obligated to bargain with the Union as though fund contributions were membership dues. As to the above, whatever the Respondent's position on this is, the record evidence clearly shows that the Respondent insisted on its proposal to change union member's obligations to the Inter-Local Pension Fund, a nonmandatory subject over which the Respondent was not free to insist. By insisting to impasse on its Inter-Local Fund proposal, the Respondent violated its duty under Section 8(a)(5) of the Act to bargain in good faith with the Union.

The Unilateral Implementation of the Respondent's Final Offer

Having found that the Respondent failed and refused to bargain with the Union in good faith when it unlawfully insisted to impasse on a nonmandatory subject of bargaining in order to reach collective-bargaining agreements, the impasse which existed on March 9, 1998, was not a legitimate impasse. Moreover, the Board has consistently held that when an employer's bad-faith bargaining or unfair labor practice precludes an agreement, the resulting impasse is tainted and invalid. Thus, any unilateral changes that the employer makes are illegal.[39] An impasse even where created in part by insistence on bargaining about a permissive subject, is invalid under the Act, and none of the terms of a final offer predicated on such an improper impasse can be lawfully implemented.[40]

While the record evidence indicates that the parties had made some progress in narrowing the open issues and that neither side believed that wages would be a problem, the Respondent's

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[37] Citing *Painters District Council No. 9*, 186 NLRB 964 (1970), enfd. sub nom. *Painters New York District Council No. 9 v. NLRB*, 453 F.2d 783 (2d Cir. 1971), cert. denied 408 U.S. 930 (1972); *Musicians Local 802,* 164 NLRB 23 (1967), enfd. sub nom. *Cutler v. NLRB*, 395 F.2d 287 (2d Cir. 1968). Having found that the Inter-Local Pension Fund contributions constitute a nonmandatory subject of bargaining, these cases would not be applicable.

[38] The Respondent states that "clearly, pension fund payment exacted from employees do not qualify as 'financial core' payments necessary for the performance of Local 1-L's duties as the exclusive representatives of employees in dealing with employers on labor-management issues" *Communications Workers v. Beck,* supra].

[39] *United Contractors*, 244 NLRB 72 (1979); *Intermountain Rural Electrical Assn*., 305 NLRB 783 (1991); and *Orthodox Jewish Home for the Aged*, 314 NLRB 1006, 1008 (1994).

[40] *Boise Cascade Corp*., 283 NLRB 462 (1987); *Retlaw Broadcasting Co.,* supra.

insistence on making contributions to the Inter-Local Pension Fund voluntary a nonmandatory subject of bargaining, over the Union's objection, resulted in an improper impasse declaration. Therefore, when the Respondent unilaterally implemented its final offer after March 9, 1998, at a time when no valid impasse had been reached it violated Section 8(a)(5) of the Act.

The Dues-Checkoff Issue

Pursuant to the parties checkoff agreements, and with written authorizations from employees, the Respondent had previously deducted the photo-engravers' and photo-industrial employees' dues payments from their wages and remitted these payments to the Union. The checkoff agreements do not appear to be expressly or automatically limited in time to the contract's duration, although employees may choose to revoke their checkoff authorizations at certain times (including after 1 year or after contract expiration) by submitting a written revocation to the Respondent. In early March 1998, after the parties' collective-bargaining contracts and their 30-day extension period had expired, the Respondent ceased deducting and remitting dues payments to the Union, although there is no evidence in the record that any employees had actually revoked their dues-checkoff authorizations in writing.

In accord with Board and court decisions, union security and dues checkoff are matters related to "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act and, therefore, are mandatory subjects for collective bargaining.[41] However, in *Bethlehem Steel Co.*, supra at 1502, the Board held that, notwithstanding that union security and checkoff are issues that normally affect the terms and conditions of employment, the employer did not violate Section 8(a)(5) of the Act when after the expiration of its agreement with the union it unilaterally ceased giving effect to the union-security and dues-checkoff provisions in the expired contract. This precedent, established in *Bethlehem Steel Co.*, has since been affirmed in numerous Board and United States Court of Appeals cases,[42] and was implicitly approved in United States Supreme Court dicta. See *Litton Financial Printing v. NLRB*, 501 U.S. 190, 199 (1991), wherein the Supreme Court stated:

> The Board has ruled that most mandatory subjects of bargaining are within the *[NLRB v.] Katz* prohibition on unilateral changes. The Board has identified some terms and conditions of employment, however, which do not survive expiration of an agreement for purposes of this statutory policy. For instance, it is the Board's view that union security and dues check-off provisions are excluded from the unilateral change doctrine because of statutory provisions which permit these obligations only where specified by the express terms of a collective-bargaining agreement. See [Sec. 8(a)(3)] (union security conditioned upon agreement of the parties); [Sec. 302(c)(4)] (dues check-off valid only until termination date of agreement); *Indiana & Michigan*, 284 NLRB at 55 (quoting *Bethlehem Steel*, 136 NLRB at 1502).[43]

In *Bethlehem Steel*, the parties collective-bargaining agreements contained both a union-security clause and a dues-checkoff provision. The Board's holding in that case was based on an acknowledgment that union-security requirements can be imposed only under a contract that conforms to the proviso of Section 8(a)(3) of the Act. And although dues-checkoff arrangements are not expressly referenced in Section 8(a)(3), the Board in *Bethlehem Steel* found that "[t]he checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions," and therefore also exist only so-long as the contracts remained in force as did the union-security provisions.[44] The agreements in *Bethlehem Steel* contained the following dues-checkoff provisions, "[T]he Company will, beginning the month in which this Agreement is signed and so long as this Agreement shall remain in effect, deduct from the pay of such Employee each month . . . his periodic Union dues for that month." Thus, in *Bethlehem Steel* the contractual checkoff provisions were explicitly limited by the duration of the collective-bargaining agreements.[45]

The rationale that underlies *Bethlehem Steel's* holding regarding dues checkoff is that union-security and dues-checkoff arrangements are so interrelated, that to enforce dues checkoff in the absence of a contract would constitute a violation of Section 8(a)(3) which requires a contract for the enforcement of union security, even though Section 8(a)(3) does not explicitly mention dues checkoff.[46] Moreover, in *NLRB v. Penn Cork & Closures, Inc.,* 376 F.2d 52, 54 (2d Cir. 1967), the court noted that where a contract contains both a union-security clause and a dues-checkoff agreement, it is logical to conclude that an employee who authorizes his individual checkoff arrangement does so because of the union-security clause "[where a contract contains both clauses] an employee is likely to authorize a dues

[41] *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enfd. in relevant part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964); *NLRB v. Proof Co.,* 242 F.2d 560 (7th Cir. 1957); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953); and *U. S. Gypsum Co.*, 94 NLRB 112 (1951).

[42] See, e.g., *Sullivan Bros. Printers, Inc. v. NLRB*, 99 F.3d 1217 (1st Cir. 1996); *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987); *Southwestern Steel & Supply v. NLRB,* 806 F.2d 1111 (D.C. Cir. 1986); *Robbins Door & Sash Co.,* 260 NLRB 659 (1982); and *Ortiz Funeral Home Corp*., 250 NLRB 730 (1980), enfd. 651 F.2d 136 (2d Cir. 1981).

[43] The Board has long held that most terms and conditions of employment established in a collective-bargaining agreement survive expiration of the agreement and cannot be changed by the employer without first bargaining to impasse with the union. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Crompton-Highland Mills, Inc*., 337 U.S. 217 (1949); and *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970).

[44] *Bethlehem Steel Co.*, 136 NLRB at 1502.

[45] Hence, the Board's reasoning that "the Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force." *Bethlehem Steel*, 136 NLRB at 1502. Since *Bethlehem Steel*, union security and dues checkoff have been viewed solely as contractual matters, and as such have been exempt from the unilateral change doctrine.

[46] *Bethlehem Steel Co*., 136 NLRB at 1502 ("The checkoff provisions in Respondents' contracts with the Union implemented the union-security provisions.").

checkoff for fear that without it he may forget to make the payments and risk dismissal for failure to pay union dues."

In substance, the Board has confirmed that union security is "inherently and solely a contractual matter, and an employer's refusal to enforce a union-security provision without a proper contractual basis is 'in accordance with the mandate of the Act." *Indiana & Michigan Electric Co*., 284 NLRB 53, 55 (1987) (quoting *Bethlehem Steel,* supra). Consistent with the reasoning that union security and dues checkoff are creatures of contract, a union's right to receive remittances pursuant to dues-checkoff authorizations is held to be extinguished on expiration of the collective-bargaining agreement creating that right.[47] Consequently, the Board has declined to find their unilateral abandonment after contract expiration to be unlawful. *Indiana & Michigan,* supra.

The General Counsel states in her brief that:

> Id. Unfortunately, perhaps because *Bethlehem Steels'* contracts explicitly limited the checkoff provision to the duration of the contracts, the Board unnecessarily conflated the union security provision with the dues checkoff provision, when they are actually two separate issues. Since then, the Bethlehem Steel case has been interpreted to stand for the broad proposition that employers can unilaterally cease dues checkoff after contract expiration without violating Section 8(a)(5). See, e.g., *Robbins Door & Sash Co., Inc*., 260 NLRB 659 (1982).

The General Counsel points out that it is "illogical" to apply this broad proposition in cases where a contract's checkoff provision is not limited in time to the contract duration, and argues that there is no reason to assume that employees who authorize dues checkoff from their wages do so solely because of the contractual union-security requirements. Employees may very well wish to continue their union membership's and have dues deducted and remitted in financial support of the union after the contract expired, or also for convenience.[48]

The General Counsel also maintains that:

> An Employer would not violate Section 8(a)(3) of the Act by honoring an employees' voluntary authorization of dues deduction. Where the checkoff mechanism is not explicitly limited to the duration of the contract, and where employees have not in fact revoked their checkoff authorization, the checkoff mechanism should be treated like any other term and condition of employment (such as wages and fringe benefits), which an employer may not change after contract expiration without giving the union notice and an opportunity to bargain.

The General Counsel argues that in view of the above the Respondent in this case violated Section 8(a)(5) of the Act by unilaterally ceasing its deduction and remittance of employees' dues payments, a mandatory subject of bargaining, without giving the Union notice and an opportunity to bargain. "To the extent that *Bethlehem Steel* has been interpreted otherwise, it should be overruled."

However, notwithstanding its ruling in the *Bethlehem Steel* case, the Board has also held that it does not violate Section 8(a)(3) of the Act to checkoff dues in the absence or expiration of a collective-bargaining agreement.[49] Nor does it violate Section 302 of the Act, which requires written authorization by an employee before dues can be deducted, but does not require an agreement between the employer and the union.[50]

Moreover, the Board and courts have indicated that although union security and checkoff go hand-in-hand, they are markedly different kinds of obligations that should not necessarily be treated as legally inseparable.[51] Unlike union-security agreements, for example, checkoff agreements give rise to independent wage assignment contracts between the employees and employer that have been held to survive the expiration of the collective-bargaining agreement when the parties so intend.[52] Additionally, Section 302 requires only that written authorization from employees for checkoff be revocable at the end of a collective-bargaining agreement, implying that, absent revocation, they survive, and the legislative history of Section 302 supports the view that checkoff authorizations "may continue indefinitely until revoked." 11 Leg. Hist. 1304, 1311 (1947).

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[47] *Bethlehem Steel Co.,* supra; *Ortiz Funeral Home Corp.,* supra*; Sullivan Bros. Printers, Inc. v. NLRB,* supra*;* and *Southwestern Steel & Supply Inc. v. NLRB,* supra. Also see *Litton Financial Printing v. NLRB,* supra.

[48] See *Lowell Corrugated Container Corp*., 177 NLRB 169, 173 (1969), and cases cited therein, affd. 431 F.2d 1196 (1st Cir. 1970).

[49] See, e.g., *Lowell Corrugated Container Corp*., 177 NLRB at 173 (employer did not violate Sec. 8(a)(2) and (3) of the Act by continuing to honor unrevoked checkoff authorizations after expiration of the collective-bargaining agreement); *Sun Harbor Caribe, Inc.,* 237 NLRB 444 (1978). See also *Chemical Workers Local 143 (Lederle Laboratories)*, 188 NLRB 705 (1971) (union did not violate Sec. 8(b)(1)(A) of the Act when it demanded that dues be checked off during a contractual hiatus period pursuant to unrevoked checkoff authorizations).

[50] See *Gulf-Wandes Corp*., 236 NLRB 810 (1978). Also, Sec. 302(c)(4), requires a "written assignment" from each employee where dues are deducted and remitted to the union, "which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner." Thus, Sec. 302(c)(4) references the collective-bargaining agreement regarding the period of a checkoff agreement's irrevocability and does not suggest that a collective-bargaining agreement is required for a dues checkoff arrangement to be valid. However, see *Litton Financial Printing v. NLRB,* 501 U.S. 190, 199 (1991) (suggesting that Sec. 302(c)(4) does require a collective-bargaining agreement for a dues-checkoff arrangement to be valid).

[51] *Shen-Mar Food Products*, 221 NLRB 1329 (1976), enfd. as modified 557 F.2d 396 (4th Cir. 1977); *NLRB v. Printing Pressmen Local 527* (*Mead Corp*.), 523 F.2d 783 (5th Cir. 1975)*;*and *Electrical Workers Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322 (1991) (checkoffs must be evaluated differently depending on whether they were executed pursuant to a union-security requirement or otherwise). However, the Board has on occasion stated the rule regarding nonsurvival of checkoff requirements broadly, without any references to the relationship between a checkoff clause and a union-security requirement. *Sweet-Kleen Laundry & Dry Cleaning, Inc*., 302 NLRB No. 121 (1991) (not published in bound decision); *AMBAC International Limited*, 299 NLRB 505, 507 fn. 8 (1990); *Hassett Maintenance Corp*., 260 NLRB 1211 (1982).

[52] See, e.g., *Frito Lay, Inc.,* 243 NLRB 137 (1979); *Associated Press,* 199 NLRB 1110 (1972); *Electrical Workers Local 2088* (*Lockheed Space Operations Co.),* supra, and cases cited therein.

As stated above, the Board has reasoned that union-security and dues checkoff are creatures of contract, and a union's right to receive remittances pursuant to dues-checkoff authorizations exist only as long as the contract creating that right remains in force.[53] Consequently, the Board declines to find their unilateral abandonment after contract expiration to be unlawful.[54] I am bound to apply established Board precedent, which the United States Supreme Court has not reversed.[55] But the Board and courts have recognized that dues-checkoff arrangements in some instances may exist in the absence of a union-security clause.[56] Perhaps the inconsistencies between the reasoning in *Bethlehem Steel* and *Lowell Corrogated* may well warrant the Board's reexamining its rulings regarding this issue. Of course any reevaluation of this area of Board precedent cannot disregard the realities surrounding the institutions of union-security and dues checkoff.[57] The Board may find that in practice union security is the procuring cause of dues checkoff and thus create a rebuttable presumption that employees have signed checkoff authorizations because of their union security concerns.[58] Moreover, the Board, in its decision, may wish to make clear that consideration of the parties intent and compliance with Sections 302 and 302(c)(4) as evidenced by the language of the written dues-checkoff authorization and the union-security provision in the collective-bargaining agreement would determine whether the presumption has been rebutted as to whether or not the checkoff authorization survives the expiration of the collective-bargaining agreement. This may require a more well-articulated precedent by the Board in this area.

From all of the above, I find and conclude that when the Respondent unilaterally ceased the deduction and remittance of dues to the Union on behalf of the unit employees (units A and B) after expiration of the collective-bargaining agreements and the 30-day extension thereon, without notice to the Union and without affording the Union an opportunity to bargain with it concerning the cessation of dues checkoff, the Respondent did *not* violate Section 8(a)(1) and (5) of the Act.[59]

The Respondent contends that there are no valid dues-checkoff authorizations complying with Section 302(c)(4) of the Act. Section 302 of the Act expressly "makes it unlawful for any employer to pay money to a union representing employees employed in an industry affecting commerce except where deductions are made from wages in payment of union membership dues pursuant to express authorizations by the particular employees." To be excepted from the Section 302 proscription, it is necessary that the employer's deduction of membership dues occur "under circumstances where the employee has signed an authorization form of the kind specified."[60] Moreover, if the payment does not meet the requirements of Section 302(c)(4) of the Act, payments in lieu of an employee's checkoff authorization of union dues are illegal.[61]

Even a longstanding practice of deducting dues and paying them over to a union cannot override the explicit statutory proscription against employer payments of dues in the absence of written checkoff authorizations.[62] The Respondent states that the Union does not possess checkoff authorization cards which would validate its claim that the Respondent should be deducting dues from the pay of employees and remitting payments to the Union. The Respondent's employees had signed checkoff authorizations for Local 1-P, which was then merged into Local 1-L, the Union herein, as of October 1, 1997. The Respondent asserts that there is evidence in the record that employees were unhappy with the Union, therefore "there is no basis for concluding that Quality employees authorizing dues checkoff for Local 1-P similarly supported Local 1-L. A presumption that Quality employees supported the new union in the same measure they supported the former union is not warranted by the record evidence." I do not agree. First, the evidence is insufficient to conclude that employees, although unhappy with aspects of the pension funds, necessarily failed to support Local 1-L as they had 1-P, regarding dues-checkoff authorizations. Barclay's description of what occurred at the union meeting after the Respondent had declared impasse, and the large membership attendance at this meeting would dispel the Respondent's contention in this regard. Next, the Respondent continued employee dues checkoff and remitted the amounts to Local 1-L from October 1997 through February 1998, presumably on the basis of the employee's written authorizations obtained by Local 1-L. Moreover, in its brief the Respondent states "Quality makes its argument regarding the validity of checkoff authorizations on the premise that Local 1-L obtained authorizations valid during a Collective-Bargaining Agreement term."

The statutory mandate of Section 302(c)(4) can be satisfied only if there are valid, extant checkoff authorizations directing dues deductions and employer remittances in favor of Local 1-L. Without valid checkoff authorizations, the Respondent's remit-

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[53] *Bethlehem Steel Co.,* supra*; Ortiz Funeral Home Corp.,* supra*; Sullivan Bros. Printers, Inc. v. NLRB,* 99 F.3d 1217, 1232 (1st Cir. 1996) (quoting *Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190 (1991)).

[54] *Indiana & Michigan*, 284 NLRB at 59.

[55] *Riser Food, Inc*., 309 NLRB 635 (1992); *Roofing, Metal & Heating Associates, Inc*., 304 NLRB 155 (1991); *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Lenz Co*., 153 NLRB 1399 (1965); and *Iowa Beef Packers,* 144 NLRB 615 (1963).

[56] *Lowell Corrugated Container Corp.,* supra; *Sun Harbor Caribe, Inc*., supra*;* and *Penn Cork & Closures, Inc*., supra.

[57] The Board has held in *Sun Harbor Caribe, Inc.,* supra; and *Lowell Corrugated Container Corp.,* supra, that an employer who has a valid dues-checkoff agreement from an employee, does not commit a violation of Sec. 8(a)(2) or 8(a)(3) of the Act when the employer continues to remit payment to a union after the expiration of a collective-bargaining agreement. These holdings suggest a conceptual connection between union security and dues checkoff that is much weaker than the connection that *Bethlehem Steel* and its progeny propose.

[58] See, e.g., *Penn Cork & Closures, Inc*., 376 F.2d. at 56.

[59] *Bethlehem Steel Co.,* supra; *Indiana & Michigan Electric Co.,* supra*; Robbins Door & Sash Co*., supra*; Ortiz Funeral Home Corp.,* supra; *Sullivan Bros. Printing, Inc. v. NLRB,* supra*; Southwestern Steel & Supply v. NLRB,* supra.

[60] *Schwartz v. Musicians Local 802*, 340 F.2d 228, 233, 234 (2d Cir. 1964).

[61] *Longshoremen v. Seatrain Lines, Inc.,* 326 F.2d 916, 920 (2d Cir. 1964).

[62] *Jackson Purchase Rural Electric Cooperative Assn. v. Electrical Workers Local 816,* 646 F.2d 264, 267 (6th Cir. 1981).

tances to the Union would be illegal, see Section 302(c)(4). The checkoff authorization in the present case states in part:

> I further agree and direct that this authorization shall be automatically renewed for successive periods of one (1) year or for the period of each succeeding applicable collective bargaining agreement, whichever is shorter, and shall be irrevocable during each such renewal period.

The Respondent asserts that necessarily, without an effective collective-bargaining agreement between it and the Union, the checkoff authorizations of its employees could not have "renewed"; they expired with the last collective-bargaining agreement, and they were no longer valid.

It appears to me that the language of the checkoff authorization in this case is sufficiently ambiguous to be construed in favor of either party. The authorization form states that, "This authorization shall remain in effect unless and until revoked by me as hereinafter provided," and explaining that an employee can achieve revocation by notifying the Respondent and the Union "not more than twenty days and not less than ten days prior to the expiration of each renewal period of one year or prior to the termination of each applicable collective-bargaining agreement, whichever occurs sooner." This language however would appear to support the General Counsel's case that the only way these authorizations can be revoked is by the employee's written notice during the prescribed period. On the other hand, the checkoff card also states, "I further agree and direct that this authorization shall be automatically renewed for successive periods of one (1) year or for the period of each succeeding applicable collective-bargaining agreement, whichever is shorter." This language seems to imply that an employee's authorization could also be revoked in the event that no other collective-bargaining agreement is signed.

In *Lowell Corrugated Container Corp.,* supra, the Board found that, by the language of the checkoff authorizations, they remained in effect even after the contract expired. In *Lowell*, the cards were automatically renewed on the expiration of a contract—the reference there to the 1-year period, etc. was only in regard to the next period of irrevocability and did not limit the duration of the employee's authorization. But in the instant case, the construction is such that both the duration of the employee's authorization and the period of irrevocability are limited to a period of 1 year or for the period of each succeeding applicable collective-bargaining agreement.[63]

However, the General Counsel is still correct in pointing out that there is nothing in the authorization cards in this case that explicitly states that the authorizations can be revoked by any means other than written notification. Of course, if the holding of *Bethlehem Steel* is followed, the question of the renewal of the authorization cards would become irrelevant.

The Respondent also contends that the "General Counsel Impermissibly is Selectively Prosecuting Quality." It maintains that the General Counsel "targets" only those employers who discontinue dues checkoff upon contract expiration and who are charged in the complaints with other unfair labor practices and leaving alone all other employers who also discontinue dues checkoff but are not alleged to have committed anything else in the complaint. The Respondent states that it has been "selectively treated . . . 'based on impermissible considerations,' including an intent to inhibit or punish the exercise of legal rights and the 'malicious or bad faith intent to injure.'"

In *Le Clair v. Saunders*, 627 F.2d 606, 609–610 (2d Cir. 1980), cert. denied 450 U.S. 959 (1981), the court stated:

> Although not precisely on point, cases involving the criminal defense of selective prosecution provide a useful analogy. In *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974), the court held:
>
> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination." [Citations omitted.]

Even assuming that the Respondent has sustained its "heavy burden" of establishing at least prima facie, that while others "similarly situated" have not generally been proceeded against because of conduct of the type forming the basis of the charge against the Respondent (i.e., where the employer unilaterally ceased deducting dues and remittance after collective-bargaining contract expiration, even where the checkoff authorization may not be limited in duration to the contract) the Respondent was singled out for prosecution,[64] the Respondent has failed to show that the General Counsel has "discriminatorily" selected the Respondent for "prosecution" invidiously or in bad faith or with the "intent to inhibit or punish the exercise of legal rights and the 'malicious or bad faith intent to injure,'"[65] I therefore reject the Respondent's defense in this regard and find it without merit.

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[63] Contrast the more lucid language of the respective authorization cards in *Lowell,* with the analogous language of the authorization cards in the case at bar, which provides:

> [An employee's authorization] shall be automatically renewed and shall be irrevocable for successive periods of one (1) year each, or for the period of each succeeding applicable collective-bargaining agreement between the employer and the [union], whichever shall be shorter. [*Lowell Corrugated Container Corp.,* 177 NLRB at 172.]

[64] See R. Exh. 14 (Operation's Memorandum VII. *Bethlehem Steel*). Aside from this however, the Respondent offered no other evidence, such as other case instances, where employers were not proceeded against under similar circumstances. This could also be considered legitimate strategy by the General Counsel in seeking a review of the whole *Bethlehem Steel* issue.

[65] *Le Clair v. Saunders,* supra; *U.S. v. Berrios,* supra*; Moss v. Hornig*, 314 F.2d 89 (2d Cir. 1963). See *Pace Industries,* 320 NLRB 661, 666 (1996).

The Respondent's May 8, 1998 Proposal

By letter dated May 8, 1998, to the Union, the Respondent modified its bargaining position to propose the elimination of the union-security and dues-checkoff provisions in the successor collective-bargaining agreements and to resume negotiations. The evidence shows that throughout the negotiations from January to March 1998, the parties never discussed these issues nor had the Respondent made any proposal to change the union security and dues-checkoff provisions of the agreements.

The Respondent asserts that its May 8 proposal to delete the union-security and dues-checkoff provisions of the contracts was made in good faith and was lawful and designed to address the Union's concerns regarding its Inter-Local Fund contributions proposals and allegations of meddling in union affairs, and to "break the existing impasse and return the parties to the bargaining table." The Respondent also admits that it was additionally concerned that "the Regional Office and Local 1-L would pursue Section 10(j) relief and an unfair labor practice complaint because of their characterization of Quality's position concerning the 2 percent Inter-Local Fund contribution as meddling with internal union affairs," and this was another purpose of its May 8 proposal, in effect, to make union membership voluntary as an "impasse breaking proposal."

However, the Respondent's proposal to eliminate the union-security and dues-checkoff provisions on May 8, 1998, came only after the Respondent learned in May 1998 of Region 29's intention to issue a complaint in Case 29–CA–21820 and 2 months after the parties' negotiations had broken off. The timing of this proposal, its drastic, unprecedented nature and the fact that the Respondent had not raised this issue previously in bargaining, indicate the Respondent's failure to bargain in good faith with the Union. This is strongly suggestive that the Respondent bargained in bad faith with the Union by making such a regressive proposal in its May 8, 1998 letter to the Union calling for the elimination of the dues-checkoff clauses and union-security clauses of the agreements, to retaliate against the Union for having pursued the charges which resulted in the complaint in this case.

Moreover, the Respondent's assertions as to the purposes of its modification of its bargaining position, namely to address the Union's concerns that "Quality intends bargaining about nonmandatory subjects," meddling in internal union affairs regarding the Inter-Local Pension Fund, and to address the "Regional Office's apparent acceptance of Local 1-L's legal position," appears pretextual under the circumstances of this case. Perhaps, if the Respondent truly wanted to address the Union's concern about its insistence to impasse on a nonmandatory topic considered meddling in union affairs, it could have withdrawn its proposal to change the Union's bylaws requiring members to participate in the Inter-Local Fund. Not only does the Respondent's May 8 proposal do nothing to address the Union's concerns, but, to the contrary, it confirms the Respondent's continued insistence on bargaining over the Union's internal affairs. (In its May 8 letter, the Respondent continues to object to the Inter-Local contributions as a "mandatory product of union membership.")

However, the mere fact that the Respondent's May 8 proposal was unacceptable to the Union does not necessarily make it unlawful. Similarly, the fact that a proposal is "regressive" does not necessarily establish that it is made in bad faith.[66] Section 8(a)(5) of the Act establishes a duty between an employer and its employees' bargaining representative to enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement.[67] Section 8(d) of the Act requires the parties to "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement." This obligation, of course, does not compel either party to agree to a proposal or to make a concession.[68] In determining whether an employer has engaged in surface or bad-faith bargaining, the Board examines the totality of the employer's conduct, both away from and at the bargaining table, including the substance of the proposals on which the party has insisted, for evidence of its real desire to reach agreement.[69]

In *Reichhold Chemicals, Inc*., 288 NLRB 69 (1988) (*Reichhold II*), affd. in pertinent part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), the Board reiterated some of the factors that it will consider in determining whether bad-faith bargaining had occurred. These include among others: unreasonable bargaining demands that are consistently and predictably unpalatable to the other party; unilateral changes in mandatory subjects of bargaining; and insistence to impasse on nonmandatory subjects of bargaining, all of which are present in the instant case evidencing the Respondent's design to frustrate a bargaining agreement. Moreover, the Board has held that the interjection of new proposals after months of bargaining can be evidence of bad-faith bargaining.[70] The Board has also held that the assertion of a proposal disingenuously is an indicia of bad-faith bargaining.[71]

From all of the above, and the timing of the Respondent's proposal, its regressive nature, without justification, the Respondent's seemingly pretextual explanation of the purpose therefore, and the Respondent's apparent disingenuous assertion of this proposal to the Union, I find and conclude that the Respondent's May 8, 1998 proposal was not made as part of any good-faith effort to reach an agreement, but instead, constituted bargaining in bad faith with the Union designed to frustrate a collective-bargaining agreement, in violation of Section 8(a)(5) of the Act.[72]

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[66] *I. Bahcall Industries*, 287 NLRB 1257 (1988), review denied sub nom. *Teamsters Local 75 v. NLRB*, 866 F.2d 1537 (D.C. Cir. 1989); *Challenge-Cook Bros*., 288 NLRB 387 (1988).

[67] *Houston County Electric Cooperative*, 285 NLRB 1213 (1987), citing *Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

[68] *Houston County Electric Cooperative,* supra. Also see *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

[69] *Overnite Transportation Co.,* 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir.1991); *United Technologies Corp*., 296 NLRB 571 (1989); *Atlantic Hilton & Towers*, 271 NLRB 1600 (1984).

[70] *Southside Electric Cooperative, Inc*., 243 NLRB 390 (1979).

[71] *Cook Bros. Enterprises*, 288 NLRB 387 (1988). Also see *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1043 (1996).

[72] The Union, in its brief, argues that it was stipulated at the trial that throughout the negotiations the parties never discussed either the union-security or dues-checkoff provisions and that this presupposes that the "parties were going to leave the union-security and dues-checkoff provisions in place." While the Board recognizes that on occasion parties may lawfully engage in regressive bargaining, it is also recognized that

The Respondent asserts in its brief that despite its "impasse breaking proposal" the Union failed to respond to its May 8 letter in any way or offer any counterproposal or to request a resumption of contract negotiations. It is well established that it is incumbent on a union, which has notice of an employer's proposed change in terms and conditions of employment, to timely request bargaining in order to preserve its right to bargain on that subject.[73] The union cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter.[74] The Respondent states that this is exactly what the Union did in this case, "purposefully renouncing bargaining and contenting itself with the filing of an unfair labor practice charge over the matter . . . and it does not provide sufficient basis to sustain the unfair labor practices alleged against Quality."

However, because of all of the circumstances in this case from which a finding of bad-faith bargaining was made by me, it would appear that any resumption of bargaining by the Union with the Respondent would be futile based on the Respondent's regressive and retaliatory proposal in its May 8 letter, which did nothing to alleviate its unlawful bargaining to impasse on a nonmandatory subject of bargaining and its bad-faith bargaining. Therefore, I also reject the Respondent's defense in this regard.[75]

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully bargained to impasse on a nonmandatory subject of bargaining, as a condition precedent to reaching final agreement on successor collective-bargaining agreements, it will be recommended that the Respondent be directed to bargain with the Union, on request, in good faith without insisting to impasse on the nonmandatory subject of the Inter-Local Pension Fund, and without making regressive or retaliatory proposals in bad-faith bargaining.

Having found that the Respondent unlawfully, unilaterally implemented the terms and conditions of its last proposals for new successor collective-bargaining agreements, I shall recommend that the Respondent be ordered, at the Union's request, to rescind the implemented terms and conditions of employment of its last proposals and reinstate the terms and conditions of employment which existed prior thereto and maintain in effect the terms and conditions of employment in the now-expired collective-bargaining agreements unless the Respondent and the Union bargain to agreement or good-faith impasse, and in the event an understanding is reached embody such understanding in a signed agreement.[76] Further, the Respondent should be ordered to make whole unit employees for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful actions in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[77]

In addition where applicable, the Respondent shall make its employees whole for any losses resulting from the Respondent's failure to make contractual welfare and pension fund payments in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Interest on any moneys due shall be computed in the manner prescribed in *New Horizons for the Retarded,* supra. The method of determining any additional amounts due to benefit funds shall be made as specified in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Because of the nature of the unfair labor practices found, and in order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, Quality House of Graphics, Inc., is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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a party which withdraws proposals that have already been agreed to may be evidence of bad-faith bargaining. *Golden Eagle Spotting Co. v. NLRB*, 93 F.3d 469 (8th Cir. 1996), citing *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983); *Rockingham Machine Lunex Co. v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981), cert. denied 457 U.S. 1107 (1982) (violation where employer rescinded or modified provisions previously agreed to); *Hartford Fire Insurance Co. v. NLRB*, 456 F.2d 201, 202–203 (8th Cir. 1972) (retreat from previously agreed-upon subjects evidence of failure to bargain in good faith). The Union further states that, "In the case at bar, the employer was seeking to change the fundamental relationship between itself and the union." I assume that the Union means by this that the Respondent sought to continue to meddle in union internal affairs by this proposal. The Union continues that "[w]hile an employer is not obligated to agree to a union-security or checkoff provision, it has been recognized that employer opposition to such a clause is a strong indicia of surface bargaining. 'A philosophical opposition to [a dues] checkoff, a union-security device, may constitute evidence of bad faith bargaining.'" (Cases omitted.) However, since union security and checkoff was never discussed at any of the negotiation sessions at least as to the Union's point, there is insufficient evidence from which to infer that the Respondent opposed such clauses in the successor agreements especially in view of its May 8 letter, as evidencing, in this connection, bad-faith bargaining.

[73] *Citizen's National Bank of Willmar*, 245 NLRB 389 (1979) (citing *City Hospital of East Liverpool,* 234 NLRB 58 (1978); *Clarkwood Corp*., 233 NLRB 1172 (1977), *Glove-Union, Inc.,* 222 NLRB 1081 (1976); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975); *American Buslines, Inc.,* 164 NLRB 1055 (1967).

[74] *American Buslines, Inc.,* supra at 1055–1056.

[75] *Contrast Paramount Liquor Co.*, 307 NLRB 676 (1992).

[76] See *Winn-Dixie Stores, Inc*., 243 NLRB 972 (1979).

[77] See also *Florida Steel Corp*., 231 NLRB 651 (1977); and *Isis Plumbing & Heating Co*., 138 NLRB 716 (1962).

2. Local One-L, Graphic Communications International Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Unit A: The unit of Employees set forth in Article 3 Section 1 of the Photo-Engravers unit collective bargaining Agreement [described more particularly herein.]
>
> Unit B: The unit of Employees set forth in Article 4 Section 4.1 in the Photo-Industrial unit collective bargaining Agreement [described more particularly herein.]

4. At all material times, the Union, by virtue of Section 9(a) of the Act has been the exclusive representative of the Respondent's employees in units A and B, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By insisting to impasse over contributions to the Inter-Local Pension Fund, a nonmandatory subject of bargaining, over the Union's objection and as a condition of reaching agreement on successor collective-bargaining contracts, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally implementing the terms and conditions of employment of its final offer without having reached a lawful impasse, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of the Respondent's employees in the above appropriate units in violation of Section 8(a)(1) and (5) of the Act.

7. By making a retaliatory and regressive bargaining proposal, the Respondent violated Section 8(a)(1) and (5) of the Act.

8. By unilaterally ceasing the deduction and remittance of dues to the Union after the expiration of its collective-bargaining agreements with the Union, the Respondent did not violate Section 8(a)(1) and (5) of the Act.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire, I issue the following recommended[78]

ORDER

The Respondent, Quality House of Graphics, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Insisting to impasse unlawfully regarding contributions to the Inter-Local Pension Fund, a nonmandatory subject of bargaining, over the Union's objection, and as a condition to reaching agreement on successor collective-bargaining agreements.

(b) Unilaterally implementing the terms and conditions of employment of its final offer without having reached a lawful impasse and without giving the Union the opportunity to bargain thereon.

(c) Making retaliatory and regressive proposals.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the Respondent's employees in the Photo-Engraver and Photo-Industrial units without insisting to impasse unlawfully over contributions to the Inter-Local Pension Fund, a nonmandatory subject of bargaining, over the Union's objections, and as a condition for reaching agreement on successor collective-bargaining agreements, and, if understandings are reached, embody such understandings in signed contracts.

(b) On the Union's request, rescind and revoke any and all unilateral changes the Respondent has made in the terms and conditions of employment instituted under its final offer, and in the event of such rescission and revocation, make employees whole for any loss of earnings and benefits they may have suffered as a result of such changes as set forth in the "Remedy" section of this decision, with interest, less interim earnings.

(c) Rescind its retaliatory and regressive proposal included in its letter of May 8, 1998.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Long Island City, New York, copies of the attached notice marked "Appendix."[79] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1998.

(f) Within 21 days after the service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[78] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[79] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."